

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WILLARD L. JAMES,	)	
	)	No. CV-10-00270-JPH
Plaintiff,	)	
	)	
v.	)	
	)	ORDER GRANTING DEFENDANT'S
MICHAEL J. ASTRUE,	)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 15, 21.) Attorney Rebecca M. Coufal represents Willard L. James (Plaintiff); Special Assistant United States Attorney Matthew W. Pile represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** the Defendant's motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff protectively filed for disability insurance benefits (DIB) on May 20, 2004.<sup>1</sup> (Tr. 98; 123.) He alleged disability due to rheumatoid arthritis, constant pain and poor eyesight with an

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<sup>1</sup>As the Defendant points out, the ALJ's recitation of the protective filing date as June 18 was in error. (Tr. 512; 98.)

1 alleged onset date of June 12, 2000. (Tr. 99.) His claim was  
2 denied initially and on reconsideration. Plaintiff requested a  
3 hearing before an administrative law judge (ALJ), which took place  
4 on March 19, 2007 and was continued on June 22, 2007. The ALJ  
5 issued an unfavorable decision on July 12, 2007 and eventually,<sup>2</sup> the  
6 Appeals Council remanded for: (1) an evaluation of Plaintiff's  
7 mental impairments; (2) an explanation related to the weight given to  
8 medical source opinions; (3) an evaluation of Plaintiff's  
9 credibility; and (4) an evaluation of the lay testimony. (Tr.  
10 534.) The second hearing was held before ALJ R. J. Payne on August  
11 6, 2009. (Tr. 699-723.) Plaintiff, who was represented by counsel,  
12 and medical experts Arvin Klein, M.D. and Thomas McKnight, Ph.D.,  
13 also testified.<sup>3</sup> The ALJ denied benefits on August 19, 2009, and  
14 the Appeals Council denied review. (Tr. 512-23; 498-500.) The  
15 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 16 STATEMENT OF THE CASE

17 The facts of the case are set forth in detail in the transcript  
18 of proceedings and are briefly summarized here. At the time of the  
19 hearing, Plaintiff was 59 years old with a high school education.  
20 (Tr. 716; 632.) He lives in a house with his long-term girlfriend  
21 and dog. (Tr. 461; 634.) He reported that his hobbies include  
22 fishing, camping, riding a motorcycle when he is able, and  
23 gardening. (Tr. 634.)

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24 <sup>2</sup>Ultimately, the parties stipulated to a remand pursuant to  
25 sentence four, and the case was remanded to the Appeals Council.  
26 (Tr. 525-27.)

27 <sup>3</sup>Plaintiff also testified at the previous hearing on June 22,  
28 2007. (Tr. 461-96.)

1 Plaintiff worked for 12 years as a computer draftsman, using  
2 the CAD system. (Tr. 464.) He testified that he had to stop  
3 working because he could no longer perform the duties of his job.  
4 (Tr. 718.) Plaintiff explained that he could not concentrate and he  
5 was making mistakes and having problems sitting. (Tr. 718-19.) He  
6 also testified at the first hearing, that he had constant pain in  
7 his neck and back, and episodes of dizziness that occasionally  
8 included brief periods of lost consciousness. (Tr. 465-67.)

#### 9 SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act (the Act) defines disability as the  
11 "inability to engage in any substantial gainful activity by reason  
12 of any medically determinable physical or mental impairment which  
13 can be expected to result in death or which has lasted or can be  
14 expected to last for a continuous period of not less than twelve  
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
16 provides that a Plaintiff shall be determined to be under a  
17 disability only if any impairments are of such severity that a  
18 plaintiff is not only unable to do previous work but cannot,  
19 considering plaintiff's age, education and work experiences, engage  
20 in any other substantial gainful work which exists in the national  
21 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the  
22 definition of disability consists of both medical and vocational  
23 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir.  
24 2001).

25 The Commissioner has established a five-step sequential  
26 evaluation process for determining whether a person is disabled. 20  
27 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is  
28 engaged in substantial gainful activities. If so, benefits are

1 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
2 the decision maker proceeds to step two, which determines whether  
3 plaintiff has a medically severe impairment or combination of  
4 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

5 If plaintiff does not have a severe impairment or combination  
6 of impairments, the disability claim is denied. If the impairment  
7 is severe, the evaluation proceeds to the third step, which compares  
8 plaintiff's impairment with a number of listed impairments  
9 acknowledged by the Commissioner to be so severe as to preclude  
10 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
11 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the  
12 impairment meets or equals one of the listed impairments, plaintiff  
13 is conclusively presumed to be disabled. If the impairment is not  
14 one conclusively presumed to be disabling, the evaluation proceeds  
15 to the fourth step, which determines whether the impairment prevents  
16 plaintiff from performing work which was performed in the past. If  
17 a plaintiff is able to perform previous work, that Plaintiff is  
18 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
19 416.920(a)(4)(iv). At this step, plaintiff's residual functional  
20 capacity (RFC) assessment is considered. If plaintiff cannot  
21 perform this work, the fifth and final step in the process  
22 determines whether plaintiff is able to perform other work in the  
23 national economy in view of plaintiff's residual functional  
24 capacity, age, education and past work experience. 20 C.F.R. §§  
25 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137  
26 (1987).

27 The initial burden of proof rests upon plaintiff to establish  
28 a *prima facie* case of entitlement to disability benefits. *Rhinehart*

1 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172  
2 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once  
3 plaintiff establishes that a physical or mental impairment prevents  
4 the performance of previous work. *Hoffman v. Heckler*, 785 F.3d  
5 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then shifts, at step five,  
6 to the Commissioner to show that (1) plaintiff can perform other  
7 substantial gainful activity and (2) a "significant number of jobs  
8 exist in the national economy" which plaintiff can perform. *Kail v.*  
9 *Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984); *Tackett v. Apfel*, 180  
10 F.3d 1094, 1099 (1999).

#### 11 ADMINISTRATIVE DECISION

12 ALJ Payne found Plaintiff was insured for DIB from June 12,  
13 2000 through December 31, 2005. (Tr. 513.) At step one, the ALJ  
14 found Plaintiff had not engaged in substantial gainful activity  
15 between June 12, 2000 and December 31, 2005. (Tr. 514.) At step  
16 two, he found Plaintiff had severe impairments of restless leg  
17 syndrome and generalized arthralgia. (Tr. 515.) He concluded  
18 recently diagnosed mental impairments were not severe. (Tr. 515.)  
19 The ALJ determined at step three Plaintiff's medically determinable  
20 impairments, alone and in combination, did not meet or medically  
21 equal one of the listed impairments in 20 C.F.R., Appendix 1,  
22 Subpart P, Regulations No. 4 (Listings). (Tr. 515.) The ALJ found  
23 Plaintiff's subjective complaints regarding functional limitations  
24 were not fully credible. (Tr. 518-19.) At step four, the ALJ  
25 concluded plaintiff's residual functional capacity was the full  
26 range of medium work. (Tr. 517.) The ALJ concluded that Plaintiff  
27 was able to perform his past relevant work as a computer draftsman.  
28 (Tr. 522.) As a result, the ALJ concluded Plaintiff has not been

1 under a disability as defined in the Social Security Act from June  
2 12, 2000, the alleged onset date, through December 31, 2005, the  
3 date last insured (Tr. 523.)

#### 4 STANDARD OF REVIEW

5 Congress has provided a limited scope of judicial review of a  
6 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the  
7 Commissioner's decision, made through an ALJ, when the determination  
8 is not based on legal error and is supported by substantial  
9 evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985);  
10 *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's]  
11 determination that a plaintiff is not disabled will be upheld if the  
12 findings of fact are supported by substantial evidence." *Delgado v.*  
13 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)(citing 42 U.S.C. §  
14 405(g)). Substantial evidence is more than a mere scintilla,  
15 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975),  
16 but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d  
17 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and*  
18 *Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial  
19 evidence "means such evidence as a reasonable mind might accept as  
20 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S.  
21 389, 401 (1971) (citations omitted). "[S]uch inferences and  
22 conclusions as the [Commissioner] may reasonably draw from the  
23 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,  
24 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as  
25 a whole, not just the evidence supporting the decision of the  
26 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir.  
27 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980).

1 It is the role of the trier of fact, not this Court, to resolve  
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
3 supports more than one rational interpretation, the Court may not  
4 substitute its judgment for that of the Commissioner. *Tackett*, 180  
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
6 Nevertheless, a decision supported by substantial evidence will  
7 still be set aside if the proper legal standards were not applied in  
8 weighing the evidence and making the decision. *Browner v. Secretary*  
9 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987).  
10 Thus, if there is substantial evidence to support the administrative  
11 findings, or if there is conflicting evidence that will support a  
12 finding of either disability or nondisability, the finding of the  
13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
14 1230 (9<sup>th</sup> Cir. 1987).

#### 15 ISSUES

16 The question is whether the ALJ's decision is supported by  
17 substantial evidence and free of legal error. Plaintiff raises four  
18 issues, contending that the ALJ erred: (1) in his credibility  
19 assessment of Plaintiff; (2) by failing to include osteoarthritis  
20 and depression as severe impairments; (3) in his weighting of the  
21 doctors's opinions; and (4) by discounting the lay testimony. (ECF  
22 No. 16 at 12-18.) Defendant contends the ALJ's decision is  
23 supported by substantial evidence and is free of legal error. (ECF  
24 No. 22 at 7-23.)

#### 25 DISCUSSION

##### 26 1. Credibility.

27 The Plaintiff argues that the ALJ failed to provide the  
28 necessary reasons, supported by the record, for finding him less

1 than fully credible. (ECF No. 16 at 19.) The Commissioner's  
2 credibility determination must be supported by findings sufficiently  
3 specific to permit the court to conclude the ALJ did not arbitrarily  
4 discredit claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341,  
5 345-46 (9th Cir. 1991) (en banc). If there is no affirmative  
6 evidence that the claimant is malingering, the ALJ must provide  
7 "clear and convincing" reasons for rejecting the claimant's  
8 testimony regarding the severity of symptoms. *Reddick v. Chater*,  
9 157 F.3d 715, 722 (9th Cir. 1998).

10 The ALJ engages in a two-step analysis in deciding whether to  
11 admit a claimant's subjective symptom testimony. *Smolen v. Chater*,  
12 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the  
13 claimant must produce objective medical evidence of an underlying  
14 medically determinable impairment, and must show that the  
15 impairment, or a combination of impairments, "could reasonably be  
16 expected to produce pain or other symptoms." *Cotton v. Bowen*, 799  
17 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1986).

18 Once the *Cotton* test is met, the ALJ must evaluate the  
19 credibility of the claimant. When assessing a claimant's  
20 credibility, the lack of objective medical evidence is a proper  
21 factor to consider along with: a claimant's treatment history; daily  
22 activities; work record as well as the claimant's reputation for  
23 truthfulness; inconsistencies in her testimony, or between her  
24 testimony and conduct observations of physicians and third parties  
25 with personal knowledge of the claimant's symptoms. *Tommasetti v.*  
26 *Astrue*, 533 F.3d 1035, 1039 (9<sup>th</sup> Cir. 2008); *Light v. Soc. Sec.*  
27 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). In addition, an  
28 adjudicator may draw adverse inferences from a claimant's failure to



1 seek treatment for symptoms for months after the alleged onset of  
2 disability. *Bruton v. Massanari*, 208 F.3d 824, 828 (9<sup>th</sup> Cir. 2001).

3 If the ALJ finds a claimant's statements are not entirely  
4 credible, he need not reject totally a claimant's symptom testimony.  
5 The ALJ may find the claimant's statements about pain to be credible  
6 to a certain degree, but discount statements based on his  
7 interpretation of evidence in the record as a whole. *SSR 96-7p*. If  
8 the ALJ's credibility findings are supported by substantial evidence  
9 in the record, the court may not engage in second-guessing. *See*  
10 *Morgan v. Commissioner, Soc. Security Admin.*, 169 F.3d 595, 600 (9<sup>th</sup>  
11 Cir. 1999); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989).

12 In this case, the ALJ found that Plaintiff's statements  
13 concerning the intensity, persistence and limiting effects of his  
14 reported symptoms were not entirely credible. (Tr. 521.) In  
15 support of this conclusion, the ALJ reviewed Plaintiff's medical  
16 records from before, during and after the claims period. (Tr. 519.)  
17 The ALJ also reviewed the records related to Plaintiff's alleged  
18 mental impairments and found scant evidence of complaints or  
19 treatment during the relevant period. (Tr. 520.) Additionally, the  
20 ALJ noted Plaintiff's test results that revealed symptom  
21 exaggeration, along with Dr. Pollack's opinion that Plaintiff may  
22 have overstated his difficulties. (Tr. 520.)

23 Contrary to Plaintiff's assertions, the ALJ's reasons for  
24 finding Plaintiff less than credible were clear and convincing,  
25 specific, and supported by the record. For example, in a July, 2009  
26 psychological assessment that occurred after the claims period, John  
27 B. Severinghaus, Ph.D., noted that Plaintiff seemed "to at times  
28 acknowledge almost any possible problem I ask him about." (Tr.

1 635.) Dr. Severinghaus also reported that Plaintiff's SIMS test  
2 score was suggestive of symptom exaggeration. (Tr. 635.)

3 Additionally, in his June, 2004 application, Plaintiff reported  
4 his disabilities as "rheumatoid arthritis/constant pain/bad  
5 eyesight." (Tr. 103; 111.) He stated that the symptoms left him  
6 unable to work in 1997, but he acknowledged that while he took an  
7 extended leave twice, he continued to work until June of 2000. (Tr.  
8 103.) As the ALJ noted, while Plaintiff claimed he could no longer  
9 work as of 2000, he did not seek regular treatment until  
10 approximately three years later. (Tr. 177.) The claimant's  
11 treatment history is an appropriate factor to consider when  
12 assessing credibility. *Tommasetti*, 533 F.3d at 1039.

13 Finally, the objective evidence lacks support for Plaintiff's  
14 alleged disabilities. The medical records explicitly indicate that  
15 Plaintiff does not suffer from rheumatoid arthritis, and while his  
16 knees have been noted as swollen and irritated, no clear etiology  
17 was identifiable. (Tr. 203; 230-31.) Nor does the record indicate  
18 that during the claims period, Plaintiff had a disabling condition  
19 with his eyesight. (Tr. 190; 197-200; 292.) When assessing a  
20 claimant's credibility, the lack of objective medical evidence is a  
21 proper factor to consider. *Tommasetti*, 533 F.3d at 1039.

22 In this case, the ALJ properly provided clear and convincing,  
23 specific reasons that are supported by the record for determining  
24 Plaintiff's diminished credibility. If the ALJ's credibility  
25 findings are supported by substantial evidence in the record, the  
26 court may not engage in second-guessing. See *Morgan*, 169 F.3d at  
27 600; *Fair*, 885 F.2d at 604 ("Credibility determinations are the  
28 province of the ALJ.").

1           **2. Step Two: Severe Impairment Determinations**

2           Plaintiff contends that the ALJ erred by failing to include  
3 depression and osteoarthritis as severe impairments. (ECF No. 16 at  
4 12.) At step two of the sequential process, the ALJ must determine  
5 whether a claimant suffers from a "severe" impairment, i.e., one  
6 that significantly limits his or her physical or mental ability to  
7 do basic work activities. 20 C.F.R. § 416.920(c). To satisfy step  
8 two's requirement of a severe impairment, the claimant must prove  
9 the existence of a physical or mental impairment by providing  
10 medical evidence consisting of signs, symptoms, and laboratory  
11 findings; the claimant's own statement of symptoms alone will not  
12 suffice. 20 C.F.R. § 416.908. The fact that a medically  
13 determinable condition exists does not automatically mean the  
14 symptoms are "severe" or "disabling" as defined by the Social  
15 Security regulations. See e.g. *Edlund*, 253 F.3d at 1159-60; *Fair*,  
16 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549050 (9th Cir.  
17 1985).

18           **a. Depression**

19           Plaintiff contends that depression should have been included in  
20 his severe impairments. The ALJ found that Plaintiff's depression  
21 was not a severe impairments because Plaintiff was diagnosed with  
22 only mild depression - dysthymia - and the record reveals he  
23 declined medication because he was improving. (Tr. 520.) In  
24 support of a depression impairment, Plaintiff cites a psychiatric  
25 evaluation from Dr. Twigg in 1997; treatment for depression at  
26 Valley Family Physicians from 2000-2003, and Dr. Pollack's  
27 psychological evaluation. (ECF No. 16 at 13.)

28           Dr. Twigg evaluated Plaintiff in September, 1997, but his

1 evaluation does not support Plaintiff's argument. (Tr. 245.) First,  
2 as the ALJ noted, Dr. Twigg's evaluation predates Plaintiff's  
3 alleged onset of disability by over three years. (Tr. 520.)  
4 Additionally, Dr. Twigg's diagnosis was "dysthymic disorder" with  
5 several rule-out disorders. (Tr. 250.) Dysthymic disorder "is a  
6 chronic type of depression in which a person's moods are regularly  
7 low. The symptoms are not as severe as with major depression."  
8 PubMed Health, National Institutes of Health,  
9 <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001916> (2011).

10 Second, the medical records from 2000 indicate that Plaintiff  
11 requested a doctor's note to take medical leave from work due to  
12 anxiety, not depression. (Tr. 170.) He complained of anxiety, poor  
13 sleep and some depression for a few months in 2000. (Tr. 171-74.)  
14 Plaintiff ultimately failed to return to work due to what he  
15 reported as car trouble, and he was fired. (Tr. 174.)

16 Few medical records are available from 2002. In 2003,  
17 Plaintiff visited the doctor roughly half a dozen times, and was  
18 diagnosed with arthralgias, depression, and restless leg syndrome.  
19 Plaintiff was prescribed 100 mg of Zoloft. (Tr. 176-77.) Dr.  
20 Rinaldi stated that he treated Plaintiff from June 5, 2000 to  
21 December 20, 2003 "primarily for joint pain, generalized arthralgias  
22 and restless leg syndrome." (Tr. 561.) Dr. Rinaldi acknowledged  
23 his notes reflected treatment for depression and anxiety, but as to  
24 the severity of the depression, Dr. Rinaldi deferred to the  
25 counselors and psychologists who treated Plaintiff. (Tr. 561.)

26 By contrast, the records from early 2004 do not indicate  
27 depression, but instead relate to Plaintiff's pain. (Tr. 185-86.)  
28 In late 2004, one of Plaintiff's secondary diagnoses was "Depressive

1 disorder NEC," but he was not prescribed an antidepressant. (Tr.  
2 191; 216.) It appears that between 2003 and 2005, Plaintiff did not  
3 take antidepressants. Dennis R. Pollack, Ph.D. evaluated Plaintiff  
4 on March 5, 2007, after the claim period, and diagnosed in part, a  
5 dysthymic disorder. (Tr. 368.)

6 In sum, no evidence exists that between 2000 and 2005,  
7 Plaintiff was diagnosed with severe depression. Nor does any  
8 evidence exist in the record that during the claim period,  
9 Plaintiff's depression significantly limited his physical or mental  
10 ability to do basic work activities. See 20 C.F.R. § 416.920(c).  
11 In the absence of evidence that Plaintiff's depression was severe or  
12 disabling, the ALJ was unable to find his depression was a severe  
13 impairment. As a result, the ALJ's conclusion that Plaintiff's  
14 depression was not a severe impairment is supported by the record.

15 **b. Cervical Impairment, Osteoarthritis.**

16 Plaintiff briefly argues that the ALJ erred by failing to find  
17 severe impairments of cervical pain and osteoarthritis.<sup>4</sup> The ALJ  
18

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19 <sup>4</sup>Plaintiff's analysis of these issues consists of a single  
20 sentence devoted to each: "The VA supports James [sic] cervical pain  
21 with the MRI of December 2005 and the X-rays of 2006 both of which  
22 show problems. The VA records similarly support a finding of  
23 osteoarthritis through James second rheumatological evaluation at  
24 the VA in 2007." (ECF NO. 16 at 13.) The court is unable to  
25 consider matters that are not "specifically and distinctly argued"  
26 in a party's brief. *Carmickle v. Commissioner, Soc. Security*  
27 *Admin.*, 533 F.3d 1155, 1161 n. 2 (9th Cir. 2008); *Paladin*  
28 *Associates, Inc., v. Montana Power Co.*, 328 F.3d 1145, 1164 (9th

1 found that Plaintiff has the severe impairment of generalized  
2 arthralgias, and noted that testing of Plaintiff's neck in 2006  
3 revealed moderate degenerative changes. (Tr. 20.)

4 With regard to Plaintiff's cervical impairment, the Plaintiff  
5 fails to point to evidence in the record, and it appears none  
6 exists, to support his argument that his cervical pain was severe or  
7 disabling. Tests from June 2006 revealed Plaintiff had "moderate  
8 degenerative changes." (Tr. 285; 338.) An MRI in September, 2006,  
9 indicated Plaintiff had a small radial tear C3-C4, mild cervical  
10 spondylosis throughout the midcervical spine, and mild straightening  
11 of the cervical lordosis, consistent with muscle spasm and/or  
12 posture. (Tr. 336.) None of the medical evidence supports  
13 Plaintiff's argument that his cervical condition was disabling or  
14 severe, and Plaintiff's vague assertion that the testing showed  
15 "problems" is not sufficient to equate to an impairment. (ECF No.  
16 16 at 13.) The ALJ's conclusion that Plaintiff's cervical issues  
17 did not constitute a severe impairment was proper.<sup>5</sup>

18 Finally, Plaintiff argues that the ALJ erred by failing to find  
19 that his osteoarthritis was a severe impairment. As noted earlier,  
20 the ALJ found Plaintiff had a severe impairment of generalized  
21 arthralgias. Plaintiff cites no evidence in the record to support  
22 his claim that osteoarthritis was severe and disabling from 2000-

23  
24 \_\_\_\_\_  
25 Cir. 2003).

26 <sup>5</sup>As the Defendant correctly notes, the ALJ's failure to include  
27 an overhead reaching limitation, in light of Dr. Moore's testimony  
28 that Plaintiff's neck problems were present prior to December 31,  
2005, was harmless error. *Carmickle*, 533 F.3d at 1162-63.

1 2005. In September, 2004, Arthur Scherer, M.D. found Plaintiff had  
2 "probable early osteoarthritis of the fingers." (Tr. 203.) Three  
3 years later, in 2007, Dr. Scherer saw Plaintiff again and diagnosed  
4 him with osteoarthritis of the hands. (Tr. 417.) But during the  
5 claim period, Plaintiff did not carry a diagnosis for  
6 osteoarthritis, nor has he established that osteoarthritis was  
7 severe and disabling. As a result, the ALJ did not err by failing  
8 to include osteoarthritis as a severe impairment.

9 **3. Medical Opinions.**

10 Additionally, Plaintiff contends the ALJ erred by dismissing  
11 Dr. Pollack's and Dr. Sims's opinions, and by adopting the opinion  
12 of Dr. McKnight. (ECF No. 16 at 15-16.) In evaluating medical or  
13 psychological evidence, a treating or examining physician's opinion  
14 is entitled to more weight than that of a non-examining physician.  
15 *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v.*  
16 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or  
17 examining physician's opinions are not contradicted, they can be  
18 rejected only with clear and convincing reasons. *Lester*, 81 F.3d at  
19 830. If contradicted, the opinion can only be rejected for  
20 "specific" and "legitimate" reasons that are supported by  
21 substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d  
22 1035, 1043 (9th Cir. 1995).

23 In this case, the ALJ found no evidentiary support within Dr.  
24 Pollacks' evaluation for his conclusion that Plaintiff was markedly  
25 limited in his ability to sustain work during a day or week. (Tr.  
26 520.) Dr. Pollack's testing revealed only some difficulty with new  
27 learning and the ability to concentrate. (Tr. 520.) The ALJ also  
28 noted that Dr. Pollack's conclusion that Plaintiff had a limited

1 ability to accept instructions and respond appropriately to  
2 criticism was based upon a test that also revealed Plaintiff likely  
3 exaggerated his symptoms, and thus the conclusion was unreliable.  
4 (Tr. 521.) Finally, the ALJ found that Dr. Pollack's assertion that  
5 Plaintiff became disabled prior to December 31, 2005 was entirely  
6 unsubstantiated by the evaluation. (Tr. 521.) The ALJ provided  
7 clear and convincing reasons for rejecting Dr. Pollack's conclusions  
8 about Plaintiff's limitation, that are supported by the record. For  
9 example, the results of the MMPI-2 test administered by Dr. Pollack  
10 to Plaintiff indicated some symptom exaggeration. Dr. Pollack  
11 opined, "he may have been overstating his difficulties." (Tr. 367;  
12 368.) Dr. Pollack concluded Plaintiff had a dysthymic disorder,  
13 with rule out pain disorder associated with both psychological  
14 factors and general medical condition, and rule out both opioid use  
15 disorder and personality disorder. (Tr. 368.)

16 Dr. Pollack also completed a check-the-box Mental Medical  
17 Source Statement. (Tr. 370-73.) In that form, Dr. Pollack  
18 indicated Plaintiff had two moderate limitations: (1) the ability to  
19 perform activities within a schedule, maintain regular attendance,  
20 and be punctual within customary tolerances, and (2) the ability to  
21 accept instructions and respond appropriately to criticism from  
22 supervisors. (Tr. 371.) Dr. Pollack listed a single marked  
23 limitation in "the ability to complete a normal workday and workweek  
24 without interruptions from psychologically based symptoms and to  
25 perform at a consistent pace without an unreasonable number and  
26 length of rest periods. (Tr. 371.) But, as the ALJ noted, Dr.  
27 Pollack's notes contain little support for these limitations, and  
28 the testing revealed only some difficulty with new learning and



1 ability to concentrate. (Tr. 520; 366-67.) The record supports the  
2 ALJ's analysis of Dr. Pollack's evaluation of Plaintiff. Because  
3 the ALJ provided clear and convincing reasons for rejecting Dr.  
4 Pollack's conclusions, the ALJ's conclusions will not be disturbed.

5 Plaintiff also generally asserts, without specific analysis,  
6 that the ALJ erred by dismissing "the opinions of the VA treating  
7 (Dr. Sims) and consulting physicians at the VA."<sup>6</sup> (ECF No. 16 at  
8 15.) The ALJ specifically addressed the VA medical records and  
9 found that testing for arthritis by the VA revealed normal results.

10 (Tr. 519.) Additionally, the ALJ noted that Plaintiff asserted he  
11 had restless leg syndrome for most of his life, yet acknowledged he  
12 was able to work. (Tr. 519.) Finally, the ALJ concluded that when  
13 Plaintiff complained of stiff and swollen joints, he had not been  
14 taking any medication, his exams indicated normal gait, strength and  
15 reflexes, and his reported activities were inconsistent with the  
16 severe limitation he described. (Tr. 519.)

17 Plaintiff fails to identify a diagnosis or endorsement of a  
18 disability from the VA that was improperly rejected. Similarly, the  
19 Plaintiff provides no analysis of medical records that were  
20 allegedly improperly rejected. As noted by the Defendant, Daniel C.  
21 Sims, M.D., treated Plaintiff in 2006, after Plaintiff's insured  
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23 <sup>6</sup>The Defendant noted that it could not meaningfully respond to  
24 Plaintiff's contention that the ALJ erred in rejecting the opinions  
25 of unspecified "consulting physicians." (ECF No 22 at n.3.) For  
26 the same reasons and in the absence of legal analysis, the court  
27 will not address the the Plaintiff's vague allegations relating to  
28 "consulting physicians." See *Carmickle*, 533 F.3d at 1162-63.

1 status expired. (e.g., Tr. 288; 290; 293; 298; 317.) Dr. Sims'  
2 treatment notes do not provide support for Plaintiff's alleged  
3 disabilities. (See e.g., Tr. 297-98; 312.) Nor did Dr. Sims assess  
4 any functional limitations for Plaintiff.

5 The Plaintiff contends that the ALJ erred by giving weight to  
6 the opinions of the medical expert, Thomas McKnight, Ph.D. The ALJ  
7 gave great weight to Dr. McKnight's opinion because he was in a  
8 unique position of being able to review the overall evidence, and  
9 because his opinion was consistent with the evidence. (Tr. 521.)  
10 Dr. McKnight opined that Plaintiff's depression was secondary to his  
11 physical problems and to his addiction to pain medication. (Tr.  
12 697.) Dr. McKnight assessed Plaintiff with only mild functional  
13 limitations. (Tr. 695.)

14 Dr. McKnight's opinions are supported by the record. In 2003,  
15 Dr. Rinaldi indicated he treated Plaintiff "primarily for joint  
16 pain..." (Tr. 561.) The record contains treatment notes that  
17 indicate Plaintiff's pain complaints, along with his depression, but  
18 in 2004, Plaintiff's complaints about depression decreased while the  
19 pain complaints increased. (See e.g., Tr. 177; 185-86; 191; 202-03;  
20 208; 210.) The record also contains multiple instances of the  
21 diagnosis of opioid dependence. (Tr. 284; 295; 302; 310; 344; 348;  
22 351.) The ALJ provided specific and legitimate reasons that are  
23 supported by substantial evidence in the record for giving  
24 significant weight to the conclusions of Dr. McKnight.

25 Finally, Plaintiff argues that the ALJ erred by adopting the  
26 opinion of Dr. Klein over the opinion of Dr. Moore. (ECF No. 16 at  
27 17.) Dr. Moore testified that Plaintiff could perform a limited  
28 range of light work, and two years later Dr. Klein testified that

1 Plaintiff could perform a full range of medium work. (Tr. 456-58;  
2 714.) In this case, the difference between these experts' opinions  
3 is immaterial because the ALJ found that Plaintiff was able to  
4 perform his previous work as a computer draftsman, which is  
5 classified as sedentary work. DICOT 007.281-101, 1991 WL 646291.  
6 As a result, the medical experts' contradictory testimony is not  
7 relevant in light of the ALJ's conclusion that Plaintiff can perform  
8 his previous, sedentary work.

9 **4. Lay testimony.**

10 The Plaintiff contends that the ALJ erred by giving no weight  
11 to the lay testimony from Plaintiff's girlfriend. (ECF No. 16 at  
12 18.) Plaintiff specifically argues that the reason provided by the  
13 ALJ - that the girlfriend's statement related to a different, and  
14 therefore irrelevant, time frame - was error. Plaintiff reasons  
15 that the ALJ had multiple occasions to inquire of the girlfriend at  
16 each hearing, and the ALJ's failure to take her testimony was error.  
17 (ECF No. 16 at 18.)

18 In determining disability an ALJ must consider lay witness  
19 testimony concerning a claimant's ability to work. *Bruce v. Astrue*,  
20 557 F.3d 1113, 1115 (9th Cir. 2009), citing *Stout v. Comm'r of Soc.*  
21 *Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006); see also 20 C.F.R.  
22 §§ 404.1513(d)(4), (e). Such testimony is competent evidence and  
23 "cannot be disregarded without comment." *Nguyen v. Chater*, 100 F.3d  
24 1462, 1467 (9th Cir. 1996). If an ALJ disregards lay witness  
25 testimony he must provide specific reasons "that are germane to each  
26 witness." *Id*; *Stout*, 454 F.3d at 1054. Lay testimony can never  
27 establish disability absent corroborating competent medical  
28 evidence. See *Nguyen*, 100 F.3d at 1467.

1 In this case, the lay evidence consisted of a letter dated June  
2 22, 2007 from Allison Atkins, Plaintiff's girlfriend. (Tr. 166-68.)  
3 Ms. Atkins' letter describes Plaintiff and his abilities up to 1998.  
4 She described Plaintiff's work, and one paragraph explains  
5 Plaintiff's physical limitations that she has observed. (Tr. 167.)  
6 Ms. Atkins relates that Plaintiff cannot ride his motorcycle, fish,  
7 camp, play music or take long walks without being sore. (Tr. 167.)

8 The ALJ found that Ms. Atkins' observations were from a time  
9 period other than from the time relevant to the claim. (Tr. 522.)  
10 Additionally, the ALJ found inconsistencies existed between the  
11 limitations that Ms. Atkins reported compared with the activities  
12 Plaintiff admitted he could still do. (Tr. 522.)

13 The record supports the ALJ's reasons. It is not clear from  
14 the letter if the description of Plaintiff's decline in abilities  
15 occurred during the claim period, or after 2005. Additionally, the  
16 record supports the ALJ's determination that some of Ms. Atkins's  
17 assertions about Plaintiff's limitations are contradicted by the  
18 Plaintiff's own admissions. For example, Ms. Atkins stated that  
19 Plaintiff cannot play music or perform yard work, yet Plaintiff  
20 admitted that his hobbies included music and gardening. (Tr. 167;  
21 202; 634.) Ms. Atkins also asserted that Plaintiff no longer fishes,  
22 but Plaintiff told Dr. Pollack in March 2007 that he has purchased  
23 a fishing license in the past three years. (Tr. 365.) He also told  
24 Dr. Pollack that his hobbies include music, fishing, camping and  
25 motorcycle riding when able. (Tr. 366.)

26 The ALJ's reasons for discounting Ms. Atkins' assertions were  
27 specific and germane. Plaintiff's argument that the ALJ should have  
28 called Ms. Atkins to testify is without citation to legal authority,

1 and it appears none exists. It is the burden of the Plaintiff, not  
2 the ALJ, to provide evidence establishing entitlement to disability  
3 benefits. See *Rhinehart*, 438 F.2d at 921 (in steps one through four,  
4 the burden of proof rests upon the claimant to establish a prima  
5 facie case of entitlement to disability benefits). Because the ALJ  
6 provided specific, germane reasons for providing no weight to Ms.  
7 Atkins's letter, the ALJ did not err.

8 **CONCLUSION**

9 Having reviewed the record and the ALJ's conclusions, this  
10 court finds that the ALJ's decision is free of legal error and  
11 supported by substantial evidence.

12 **IT IS ORDERED:**

13 1. Defendant's Motion for Summary Judgment (**ECF No. 21**) is  
14 **GRANTED.**

15 2. Plaintiff's Motion for Summary Judgment (**ECF No. 15**) is  
16 **DENIED.**

17 The District Court Executive is directed to file this Order and  
18 provide a copy to counsel for Plaintiff and Defendant. Judgment  
19 shall be entered for **DEFENDANT** and the file shall be **CLOSED.**

20 DATED this 22<sup>nd</sup> day of August, 2011.

21 S/JAMES P. HUTTON

22 UNITED STATES MAGISTRATE JUDGE  
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